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No. 01-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

CITY OF COLUMBUS, MITCHELL BROWN, and BOBBIE BEAVERS,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., and THE TOWING AND RECOVERY ASSOCIATION OF OHIO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS

DAVID A. FERRIS
CARLILE PATCHEN & MURPHY
366 East Broad Street
Columbus, Ohio 43215
(614) 628-0808

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Respondents

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QUESTION PRESENTED

Does 49 U.S.C. § 14501(c), which explicitly preempts both "a State" and "a political subdivision of a State" from enacting or enforcing any law "related to a price, route, or service of any motor carrier," but exempts only the "authority of a State" to regulate the safety of motor vehicles, thereby preempt municipal regulation and licensing of tow-truck operations – other than laws governing the price of nonconsensual tows, which are expressly exempted from preemption under subsection (c)(2)(C)?

LIST OF PARTIES

The only parties to this proceeding are listed in the caption. Pursuant to Supreme Court Rule 29.6, the Court is advised that respondents have no parent companies and that no publicly held company owns 10% or more of stock in either respondent.

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INTRODUCTION

Congress accomplished a sweeping deregulation of the motor carrier industry nationwide by enacting the Federal Aviation Administration Authorization Act ("FAAA Act"), Pub. L. No. 103-305, 108 Stat. 1569 (1994), followed almost immediately by the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899 ("ICCTA"). In those statutes, it clearly stated that the authority of States *and* political subdivisions to apply their laws related to the "price, route or service of any motor carrier" (including tow trucks) is expressly preempted. *See* 49 U.S.C. § 14501(c). Congress then provided specific exemptions from preemption for *both* States *and* political subdivisions (including one addressing the price of nonconsensual towing operations), none of which applies here. Congress also provided one other set of exemptions from preemption, which it extended to the authority "of a State" but *not* to the authority of a political subdivision. In context of this particular statutory regime, the court below correctly held that the statute expressly preempts municipal licensing laws that apply to the consensual towing operations at issue in this case.

As discussed below, the text and structure of the statute, along with the cardinal principles of statutory construction that establish the baseline for crafting federal legislation, all strongly support preemption here. Preemption also accords with the core purpose of the statute itself, which completed congressional deregulation of the trucking industry in order to reduce prices and promote efficiency for consumers. This purpose was achieved by abolishing the venerable ICC and by clearing away a costly patchwork of restrictions and regulations that had accumulated in both the interstate and intrastate trucking markets. Congress thus carefully limited the extent of permissible regulation at the state and local level, in order to liberate the trucking industry as much as possible from an

inconsistent and inefficient tangle of impediments that would frustrate these deregulatory goals.

Congress' considered decision to adopt this approach is clearly set forth in the plain language of the statute, and its express provisions on preemption are not subject to regulatory deference. Moreover, this construction of the statute poses no constitutional problems under the Tenth Amendment and must be given effect under the Supremacy Clause. In sum, the decision below on the express preemption issue, which is consistent with the great weight of lower court authority, is correct and should be affirmed.

COUNTERSTATEMENT OF THE CASE

I. Evolution of the American Motor Carrier Industry.

Within the transportation sector, "[o]ver-the-road trucking is a relatively new industry, with a pedigree about as old as the airlines.. The condition of roads prior to the First World War made long-distance hauling impractical, and a heavy duty chassis suitable for hauling goods did not appear until the middle 1920's." William E. Thoms, *Rollin' on . . . to a Free Market: Motor Carrier Regulation 1935-1980*, 13 TRANSP. L.J. 43, 44-45 (1983). Trucking grew up as an adjunct to other modes of transportation, particularly the railroads, which held a virtual freight monopoly. The gradual development of an all-weather system of roads, however, made trucking a superior mode of carriage for "high-valued shipments," and increasingly with respect to other inter-city freight, since the truck "could go from door to door without any incidental switching." *Id.* at 45-47.

In these early years, motor carriers were regulated, if at all, at the state level. Yet the expansion of this mode of transport created new issues, including a ruling by this Court that no State could forbid or limit a motor carrier from engaging in interstate commerce. *See Buck v. Kuykendall*, 267 U.S. 307 (1925). From many quarters, not least the railroads, there was a growing call for federal regulation of motor carriers; at the same time, ease of entry and the resulting cut-throat competition made

many truckers themselves desirous of an orderly system of regulation to limit entry and provide control over specific routes. Congress responded by enacting the Motor Carrier Act of 1935, Pub. L. No. 255, 49 Stat. 543, which authorized the ICC to establish a new regime of federal regulation. "Utility-type regulation was thus adopted for an industry which had few characteristics of a natural monopoly." Thoms, *supra*, at 50. *See generally* WILLIAM R. CHILDS, TRUCKING AND THE PUBLIC INTEREST: THE EMERGENCE OF FEDERAL REGULATION 1914-1940 (1985). The Court later elaborated on its *Buck* decision by ruling that no municipality could impose a comprehensive licensing scheme that would limit a motor carrier from engaging in interstate commerce by denying a license for noncompliance with its provisions. *See, e.g., City of Chicago v. Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77 (1958); *Railroad Transfer Serv. Inc. v. City of Chicago*, 386 U.S. 351 (1967).

Under federal regulation, motor carriage blossomed as a mode of transport, aided by continuing improvements in roads and vehicles. Over time, the industry began to provide an array of distinct services, including common carriage of general commodities, agricultural transport, private carriage, package delivery, truck rentals, moving vans, bus service, and specialized carriage. Criticism of the regulatory model mounted, however, amidst charges that restricted entry and agency capture were blocking the benefits of competition in what could easily be a competitive industry. The intrastate trucking market also remained subject to regulation at the state level. Artificially high rates were determined to disserve the public and foster inflationary pressures by acting as a tax on all producers who used trucking services – an ever larger segment of the American economy. *See* ROBERT FELLMETH, THE INTERSTATE COMMERCE OMISSION (1970); Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971). Over the next decade, the ICC began to liberalize entry and favor promotion of competition, and some States followed its lead. *See, e.g., Liberty Trucking Co., Extension – General Commodities*, 130

M.C.C. 243 (1978). In 1980, Congress embraced this shift by enacting partial deregulation that revamped the ICC's control of interstate trucking to promote competitive and efficient transportation services. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793.

II. Deregulation of Interstate and Intrastate Trucking.

Over the ensuing decade, it was recognized that the policy choice to deregulate trucking markets and promote unfettered competition not only would require further measures at the federal level, but would require dislodging existing state and local regulation as well. An important model was the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, which had scaled back regulations in the air carrier industry. Its broad provisions for preemption of state and local laws was initially extended to freight forwarders in the Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993. There was also growing support for extending the same provisions to the rest of the motor carrier industry.

After a legislative struggle, this was achieved in two steps. First, Congress passed the FAAA Act, which deregulated intrastate regulation of motor carriers. In it, Congress enacted an express preemption clause for motor carriers (and amended the preemption clause for air carriers to make them identical), which nullified any state or local law or regulation "related to a price, route, or service of any motor carrier" of property. 49 U.S.C. § 11501(h)(1) (1994). Contrary to frequent assertions made about it, this statute went well beyond preempting only "economic" measures enacted by state and local governments. Instead, it was directed at uprooting the great mass of laws and regulations found at the state and local level that imposed costly burdens on intrastate trucking. It accomplished this objective for the entire spectrum of interstate and intrastate motor carriers, in order to level the playing field within the trucking industry and promote vigorous new forms of competition. *See* H.R. Conf. Rep. No. 103-677, at 83-87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755-59.

A year later, Congress took a second and related step by abolishing the ICC (the oldest independent federal regulatory agency and the most enduring agency ever to be eliminated) and unfettering competition in the interstate trucking market. *See* ICCTA, *supra*. This statute recodified the express preemption clause from the FAAA Act with minor revisions, except that Congress added an exemption explicitly restoring state *and* local authority to regulate the price of nonconsensual towing operations. *See* 49 U.S.C. § 14501(c)(2)(C).

III. Developments in the Marketplace for Towing and Recovery Services.

The development of towing and recovery services parallels in certain respects the growth of the motor carrier industry as a whole. From its origins as a quintessentially local service, the motor carriage of vehicles has expanded into interstate commerce with the advent of long-haul towing. While many towing companies continue to operate in a specific geographic area, other towing companies have merged operations to secure new efficiencies and economies of scale, and some now do business in multiple States. *See* Brief of Amicus Curiae Towing & Recovery Ass'n of Am. in Support of Respondents 1-6. Although some had questioned whether Congress intended the motor carrier deregulatory statutes to apply to tow trucks at all, *see, e.g.*, *Giddens v. City of Shreveport*, 901 F. Supp. 1170, 1183 (W.D. La. 1995), Congress put this issue to rest by enacting a limited exemption from the preemption clause in 49 U.S.C. § 14501(c)(1), which specifically applied only to the *price* of *nonconsensual* towing operations, *see id.* § (c)(2)(C).

The towing work performed by respondents and other tow-truck operators falls into two distinct categories. "Consensual" tows are performed at the request of the vehicle owners, who select the towing operators they wish to use. These services are purely contractual in nature, and include towing, storage, security, and repair of the vehicle. "Nonconsensual" tows are performed without the consent of the vehicle owners, which may include the towing of unauthorized vehicles from private

property, stolen or abandoned vehicles, or the towing of vehicles disabled in an accident when the vehicle operator is unable or unwilling to select a towing service. In nonconsensual towing situations, many municipalities have assumed direct control over the towing of all vehicles disabled in accidents, and their authority to do so has been consistently upheld by the lower courts under the "municipal proprietor" exception to preemption. *See, e.g., Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 694-96 (5th Cir. 1999); *Petrey v. City of Toledo*, 246 F.3d 548, 555-59 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1048-50 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001). Respondents have urged that this authority – along with each State's undisputed authority to regulate the safety of motor vehicles under 49 U.S.C. § 14501(c)(2)(A) – affords ample means to address the safety issues raised by petitioners.[1]

IV. The Background to These Proceedings.

Respondent Ours Garage and Wrecker Service, Inc. operates a towing business in Ohio. Respondent Towing and Recovery Association of Ohio, a trade organization, comprises members who do business in the towing and recovery industry in Ohio and elsewhere. *See* Pet. App. 1a-2a.

The City of Columbus has adopted ordinances that govern any towing operation that picks up vehicles within its municipal limits. *See* Columbus City Code §§ 549.01-.99 (reprinted at Pet. App. 36a-47a). The Columbus Director of Public Safety has issued rules and regulations governing towing operations. *See* City of Columbus Wrecker Rules and Regulations (reprinted at Pet. App. 47a-53a). In general, these regulations constitute a licensing scheme for all tow trucks, including recordkeeping, inspections, identification, and insurance requirements. *See id.*

[1] For a detailed account of the rise and decline of federal, state, and local regulation in the motor carrier industry, and its long march toward unfettered competition, see Brief of the American Trucking Ass'ns, Inc. et al. as Amici Curiae in Support of Respondents, Section A.

These regulations also impose, as a condition for obtaining a municipal license, a requirement that each towing operator must pay specified fees for each vehicle ($75 annually per vehicle) and each driver ($25 per driver in the first year and then $15 annually per driver). *See id.* at 38a.

Respondents filed this declaratory judgment action in federal court, contending that Columbus' towing regulations are expressly preempted as applied only to *consensual* towing operations. *See* J.A. 8-9. The facts were not disputed and both parties moved for summary judgment. *See id.* at 15-19. The District Court granted summary judgment for respondents, holding that the regulations were preempted. Pet. App. 34a.

While petitioners' appeal was pending, the Sixth Circuit issued its decision in *Petrey*, which the City conceded was controlling here. *See* Pet. App. 2a. The Court of Appeals noted that respondents had brought this case to enjoin enforcement of Chapter 549 of the Columbus City Code, "which regulates consensual towing operations." *Id.* It also noted that in *Petrey*, "we held that the ICA does not preempt municipal licensing and safety regulation of non-consensual towing operations when a municipality acts as a market participant, but does preempt other regulation not falling within this narrow exception." *Id.* Based on *Petrey*, therefore, the Court of Appeals simply affirmed the judgment of the District Court in a brief opinion. *See id.*

SUMMARY OF ARGUMENT

Congress has clearly stated that the authority of States *and* political subdivisions to apply laws or regulations related to the prices, routes, and services of motor carriers is expressly preempted. *See* 49 U.S.C. § 14501(c)(1). Congress then provided several specific exemptions from preemption for *both* States *and* political subdivisions, *see id.* § (c)(3), including one exception that addresses the price of nonconsensual towing operations, *see id.* § (c)(2)(C). None of those exceptions is applicable here, except to confirm that tow trucks are classified as "motor carriers" within the ambit of the statute. *See id.*

Congress also provided one other set of exemptions from preemption, which it extended to the authority "of a State" but did *not* extend to the authority of a political subdivision. *See id.* § (c)(2)(A). The plain text of the statute thus expressly preempts municipal laws related to the "price, route, or service" of the consensual towing operations at issue in this case.

The statutory text, its structure, and accepted canons of statutory construction all strongly support preemption here. Petitioners' reading would accord no meaning at all to one of the key statutory phrases – "political subdivision" – and would essentially read it out of a statute where it appears frequently. In addition, it is well settled that where Congress used specific language repeatedly in a statutory section and then purposely omitted the same language from one of its subsections, that distinction is understood to be deliberate and must be given its natural effect of conveying a different meaning. Finally, the Court has often stated that a saving clause cannot be construed in a manner that defeats the objective served by the principal preemption clause, as would be the case here if the "safety" exception were read broadly to authorize every municipality and local unit of government to impose their own licensing schemes and related fees upon any and all types of motor carriers.

Preemption also accords with the core purpose of the statutes that deregulated the motor carrier industry, which mirrored the preemption provisions of the prior law deregulating air carriers. In the course of deregulating the trucking industry nationwide – including both its interstate and intrastate markets – Congress sought to promote free competition among motor carriers in order to provide greater efficiency and lower prices for consumers. With this objective in mind, Congress abolished the ICC, substantially reduced the amount of federal regulation, and carefully limited the extent of permissible regulation at the state and local level. These steps were all designed to liberate the trucking industry as much as possible from an inconsistent and inefficient tangle of restrictions that would impede the central goal of deregulation. Construing the statute to preempt

municipal and other local laws that would license and regulate the operations of motor carriers is the only result here that is consistent with its core purpose.

Congress' considered decision to adopt this sensible approach in the plain language of the statute must be given effect under the Supremacy Clause. Because the text is clear and provides no basis for regulatory adjudication of the metes and bounds of the express preemption clause, regulatory deference is not warranted. Finally, federal limitations on municipal authority in this realm do not infringe the Tenth Amendment and hence there is no justification to depart from the explicit language of the express preemption clause.

ARGUMENT

I. MUNICIPAL REGULATION OF CONSENSUAL TOWING OPERATIONS IS EXPRESSLY PREEMPTED UNDER 49 U.S.C. § 14501(c).

This case presents a question of express preemption, based on Congress' action in specifically articulating the bounds of preemption in the text of the statute itself. It thus presents no issues about implied preemption or regulatory implementation of delegated discretion. Instead, it turns entirely on the proper interpretation of statutory language.

In express preemption cases like this one, the "ultimate touchstone" in "identify[ing] the domain expressly preempted" is, and can only be, congressional purpose as embodied in the text of the legislation actually enacted by Congress. *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2414 (2001). In all such cases, the command of the Supremacy Clause must be honored, and preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Even in "areas of traditional state regulation such as family law," the background presumption against preemption is "overcome where, as here, Congress has made clear its desire for preemption" by enacting

an express preemption clause. *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001). This is particularly true in an area where the federal government has had extensive involvement, *see United States v. Locke*, 529 U.S. 89, 107-08 (2000), such as motor carriage transportation affecting interstate commerce.

This inquiry therefore begins, and typically ends, "with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (quotation omitted). As shown below, in 49 U.S.C. § 14501, Congress affirmatively extended its deregulation of the interstate trucking market to the intrastate trucking market as well. To achieve this objective, Congress expressly preempted virtually all municipal regulation of motor carriers of property, including the licensing scheme at issue in this case.

A. The Statute Expressly Preempts Any "Political Subdivision" from Applying Its Own Laws Related to Prices, Routes, or Services of Motor Carriers; the Saving Provisions for "Authority of a State" Do Not Dictate Otherwise.

1. *The Plain Meaning of the Preemption Clause.*

In an express preemption case like this one, the statutory analysis must begin with the text of the preemption clause itself. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent."). Here the preemption clause states as follows:

> **(c) Motor carriers of property.—**
>
> **(1) General rule.**—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

The sense conveyed by this preemption clause is familiar, as the Court has twice construed virtually identical language in the preemption clause of the Airline Deregulation Act of 1978, now codified at 49 U.S.C. § 41713(b)(4). *See American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). In addressing this provision, the Court has made two points highly relevant here: *first*, that it is broad; *second*, that it is not all-encompassing.

Regarding the breadth of the preemption that Congress provided in these terms, the Court has held that it incorporates the ordinary meaning of the phrase "relate to" as construed in ERISA, where the preemption provision has been understood to be "'deliberately expansive.'" *Morales*, 504 U.S. at 383-84 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987)). Accordingly, the statute is construed to preempt actions that have "'a connection with or reference to'" the price, route, or service of any motor carrier. *Morales*, 504 U.S. at 385 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). *See also Wolens*, 513 U.S. at 222-23 (same).

Thus, in *Morales*, the Court held that federal law preempted state efforts to prohibit allegedly deceptive airline fare advertisements by enforcing published guidelines through their general consumer protection statutes – actions which had both a connection with and a reference to airline fares, and indeed would have had "a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge." 504 U.S. at 390. Similarly, in *Wolens*, the Court applied the same tests to hold that federal law

preempted application of the Illinois Consumer Fraud Act to police the marketing practices of the airlines, 513 U.S. at 228, though it denied preemption with respect to "routine breach-of-contract claims" adjudicated in the state courts, *id.* at 232.

At the same time, however, the Court recognized that the great breadth of the scope of preemption must be cabined within certain common-sense limits. In *Morales*, in response to an argument that this broad reading of the preemption clause would sweep within its orbit "state laws against gambling and prostitution as applied to airlines," the Court demurred, noting that "'some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." 504 U.S. at 390 (quoting *Shaw*, 463 U.S. at 100 n.21) (brackets in original). And in *Wolens*, the Court reaffirmed that "state actions 'too tenuous, remote, or peripheral'" in nature were not implicated at all by the preemption clause. *Wolens*, 513 U.S. at 224 (quoting *Morales*, 504 U.S. at 390).

There is thus an important limitation on the scope of the preemption clause in 49 U.S.C. § 14501(c)(1). This provision, though written broadly, does not create a "law-free zone" surrounding all motor carriers. For example, general corporate tax laws that apply to all other businesses indisputably apply in the same fashion to motor carriers, even though such laws inevitably bear upon the prices charged for trucking services. The same goes for sales taxes, workers' compensation laws, minimum wage laws, pension laws, and all other general provisions that play at least some part in dictating the prices charged by motor carriers. *See, e.g., Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998) (prevailing wage laws not preempted). In the Court's own terms construing the applicable statutory language, these matters either lack the requisite "connection with or reference to" motor carrier prices, *Morales*, 504 U.S. at 385 (quotation omitted), or they are "state actions too tenuous, remote, or peripheral" in nature to be implicated by the preemption clause. *Wolens*, 513 U.S. at 224 (quotation

omitted). In the same vein, general provisions that also have some bearing upon the services provided by motor carriers (and hence also on price), such as contract laws, employment laws, traffic laws, labor laws, and tort laws governing compensation for injuries to persons or property, are simply not implicated by the preemption clause. *Cf. California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 323-34 (1997) (ERISA does not preempt state prevailing wage law, which does not "relate to" employee benefit plans); *Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-68 (1995) (ERISA does not preempt state provisions for hospital surcharges, which do not "relate to" employee benefit plans).

Application of these principles under the preemption clause in 49 U.S.C. § 14501(c)(1) is straightforward in this case. The municipal licensing program challenged by respondents (with respect to consensual towing operations) applies on its own terms to all towing operators. The program includes special requirements for recordkeeping, inspections, identification, and insurance, while imposing specified annual fees for each vehicle and each driver as a condition for obtaining a municipal towing license. *See* Pet. App. 47a-53a. This licensing program thus has *both* "a connection with" *and* a "reference to" the prices and services of towing operators, because it directly affects their costs and manner of doing business, and it specifically applies only to them. *Morales*, 504 U.S. at 385. Furthermore, there is no question that a tow truck is a "motor carrier of property." The statute defines a "motor carrier" as "a person providing motor vehicle transportation for compensation," which encompasses tow trucks as well as all other kinds of trucks that provide for-hire services. 49 U.S.C. § 13102(12). Moreover, towing operators are in the regular business of transporting other vehicles, which makes them motor carriers "of property" within the meaning of section 14501(c)(1). Indeed, if any doubts remained on this score, the specific reference to *nonconsensual towing operations* in the saving provision set forth in section (c)(2)(C) leaves no room to doubt Congress'

recognition and understanding that other towing operations are encompassed within the terms of the preemption clause.

Indisputably, therefore, the licensing scheme challenged in this case, which was imposed by a "political subdivision" as specifically identified in subsection (c)(1), falls within the express terms of the preemption clause. It is also notable that none of this statutory analysis is unique to towing operators: any similar municipal licensing scheme that applied to other motor carriers of property, such as FedEx, UPS, and the like, would be preempted to the exact same extent and under the very same analysis of the plain text of the preemption clause.[2]

2. *The Plain Meaning of the Preemption Clause Combined with the Saving Clauses.*

In this particular statute, the express preemption clause is not presented in a vacuum, and does not constitute the entirety of the statutory subsection in which it appears. Instead, it is followed by distinct categories of saving clauses with several additional subcategories, all of which, taken in combination, further elucidate the scope of the principal clause and its effect on preemption. *See* 49 U.S.C. § 14501(c)(2)-(4). Each of these saving clauses is designed to carve out specific realms in order to "save" them from preemption. Although they all use slightly different verb forms to accomplish this purpose – "shall not apply," § (c)(4); "shall not affect," § (c)(3); "does not apply," § (c)(2)(B)&(C); "shall not restrict," § (c)(2)(A) – the effect is the same, to create saving provisions similar to those found in many other preemption statutes. *See, e.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (National Traffic and Motor Vehicle Safety Act of 1966); *Easterwood*, 507 U.S. 658 (Federal Railroad Safety Act of 1970).

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[2] One distinction without a difference is that FedEx has been determined to be an "air carrier" covered by the preemption clause contained in 49 U.S.C. § 41713(b)(4), which is identical in every relevant respect to the language of 49 U.S.C. § 14501(c)(1).

The sole saving provision cited by petitioners and their *amici* to avoid preemption in this case is the first clause of section (c)(2)(A), which refers to "the safety regulatory authority of a State with respect to motor vehicles." *Id.* We will return in the next section to consider in more detail what precise realm Congress thereby intended to "save" from preemption, and why we think the text cannot bear the weight of petitioners' arguments. For the moment, however, it is important to see how the principal preemption clause fits together with the subordinate saving clauses, because when the statute is taken as a whole, the plain meaning of the language of section 14501(c) is evident. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (following "cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context").

The principal saving clauses are found in subsections (c)(2) and (c)(3), and they provide as follows:

> subsection (c)(2)(A) saves the "authority of a State" with respect to the safety of motor vehicles; highway route controls based on size, weight, or hazardous cargo of motor vehicles; and insurance for motor carriers;
>
> subsection (c)(2)(C) saves the "authority of a State or a political subdivision of a State" with respect to the price of nonconsensual for-hire motor vehicle transportation by a tow truck; and
>
> subsection (c)(3) saves the "authority of a State, political subdivision of a State, or political authority of 2 or more States" with respect to various aspects of intrastate transportation of property by motor carriers, such as uniform bills of lading and antitrust immunity.[3]

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[3] Other minor saving provisions, not relevant here, exempt the transportation of household goods, *see* § (c)(2)(B), and motor carriers of property that operate within the State of Hawaii, *see* § (c)(4).

In essence, therefore, Congress has provided in this statute as follows: ***A, B, and C*** are preempted from acting in a particular realm; *except that* ***A*** has authority to take certain actions within that realm; *and except that* ***A and B*** have authority to take certain other actions within that realm; *and except that* ***A, B, and C*** have authority to take various other actions within that realm.

The question posed by the statutory posture in this case is whether ***B*** can claim the authority to take those actions listed in the first exception, where the plain language of the statute has named ***A and B*** in the preemption clause and then saved the authority to so act solely for ***A***. We submit that the *only* natural and ordinary meaning of this language, read together, is that ***B***'s authority to act is explicitly extinguished in the preemption clause and is not restored in the saving clause. This is even more clearly the case, given that ***B***'s authority to act is expressly preserved in the other saving clauses. Under the plain meaning of the statute, it is thus apparent that ***B*** lacks the claimed authority. In context of this statute, therefore, a "political subdivision of a State" cannot claim that the express preemption of its authority, which is accomplished in subsection (c)(1), is overridden by the saving provisions in subsection (c)(2)(A), which specifically refer only to "a State." *See, e.g.*, *Iselin v. United States*, 270 U.S. 245, 251 (1926) ("What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court . . . . To supply omissions transcends the judicial function.").

3. *The Effect of the Saving Provisions.*

Rather than beginning with the language of the preemption clause in subsection (c)(1), petitioners instead offer a reading of the statute that focuses solely on the first clause of the initial saving provision, which exempts from preemption "the safety regulatory authority *of a State* with respect to motor vehicles." § (c)(2)(A) (emphasis added). By divorcing this phrase from its surrounding text and context, petitioners contend that the phrase

"state regulatory authority" must be read, by definition, to preserve *both* state *and* municipal authority. *See* Petr. Br. 16-20. The statute, however, makes a careful separation between the authority "of a State" to enact or enforce regulations and the authority of "a political subdivision of a State" to enact or enforce regulations. Petitioners' muscular construction ignores the text of these statutory provisions taken as a whole, including both the principal preemption clause and the saving clauses.[4]

As an initial matter, the phrase "safety regulatory authority of a State with respect to motor vehicles" is equivalent to "the authority of a State to regulate the safety of motor vehicles." That is how petitioners and their *amici* read the statute also, which means that they place primary weight on the general phrase "regulatory authority," which they consider to be the same as "authority to regulate." Petr. Br. 16. Petitioners then put forward a legal definition of the term "*regulation*," which refers to the "act or process of controlling by rule or restriction," including "subordinate legislation" and "delegated legislation." *Black's Law Dictionary* 1289 (7th ed. 1999). Petitioners make much of the fact that this one lexicon also mentions that a "regulation" may be "issued by an administrative agency or a local government." *Id.* But standard definitions make clear that the term "regulation" itself is source-neutral, and refers only to a "governmental order having the force of law,"

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[4] In addition, it bears mention that the term "State" is defined in this statute to mean "the 50 States of the United States and the District of Columbia," 49 U.S.C. § 13102(18), though other provisions of Title 49 define "State" for other purposes to include political subdivisions. *See, e.g.*, 49 U.S.C. § 31132(7)-(9) (defining "State" to include "a political subdivision" in some sections of the Motor Carrier Safety Act of 1984, but not in other sections). The particular factual and legal context is similarly crucial under the Constitution itself: the term "State" is defined to include political subdivisions under the Fourteenth Amendment, *see, e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 173 (1970), but not under the Eleventh Amendment, *see, e.g.*, *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

i.e., a "principle, rule, or law designed to control or govern conduct." *American Heritage Dictionary* 1471 (4th ed. 2000).[5] The use of this source-neutral term thus imparts no *content* that would answer the question of whether a "regulation" is being imposed by a particular branch or level of government. And it certainly cannot override Congress' specific designation of which levels of government have such authority.[6]

Citing some judicial opinions that have referred to state "regulatory authority" in other contexts as including municipal regulation, petitioners also suggest that Congress should be understood to have used this phrase to evoke an alleged "tradition of meaning," so that it must be read to encompass municipal authority as well. Petr. Br. 17-18. This alleged tradition, however, does not bear scrutiny. Instead, the cases and other statutes merely show that when Congress and the courts refer to state "regulatory authority" in some contexts, they explicitly encompass only state authority, whereas in other contexts they may use this phrase to encompass both state and municipal authority. The proper inquiry, therefore, is always a contextual determination. But Congress' decision to employ the phrase "regulatory authority" imports no recognized meaning that determines this question one way or the other.

Indeed, this statute itself demonstrates the fallacy of the argument. In the principal preemption clause, for example, Congress refers to the authority of "a State . . . [to] enact or

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[5] *See Webster's Third New Int'l Dictionary* 1913 (1993) (defining "regulation" as "an authoritative rule or principle dealing with details of procedure," or as "a rule or order having the force of law issued by an executive authority of a government").

[6] In any event, other aspects of petitioners' arguments show that they place no real significance on the term "regulatory" in the phrase "regulatory authority," since they read all three clauses of subsection (c)(2)(A) in precisely the same way, even though the second clause refers only to the unelaborated "authority of a State" and says nothing about "regulation" or "regulatory" authority. *See* Petr. Br. 27-28.

enforce a . . . regulation." 49 U.S.C. § 14501(c)(1). It cannot seriously be maintained, however, that this authority is intended to include municipal regulation as well as state regulation, for Congress also referred separately *in the same passage* to the authority of a "political subdivision of a State . . . [to] enact or enforce a . . . regulation." If the "regulatory authority" of a State were to be read as petitioners suggest, then the latter clause in subsection (c)(1) is meaningless and nonsensical. The same problem would also arise with the identical uses of the term "regulation" in the saving clauses found in subsections (c)(2)(C) and (c)(3). It thus appears that Congress employed the term "regulation," as found throughout this statute, to refer only to those controlling rules and directives imposed pursuant to delegated legislative power *at the same level* of jurisdictional authority – *i.e.*, in some instances regulations imposed by "a State," in other instances regulations imposed by a "political subdivision of a State," and in yet other instances regulations imposed by a "political authority of 2 or more States." *Id.* § (c)(1).

Because the term "regulation" is used in other parts of 49 U.S.C. § 14501(c) to refer only to delegated legislative actions taken at the same level of government, it would be improper to read the phrase "regulatory authority" in any different fashion in subsection (c)(2)(A). Indeed, it is an "established canon of construction that similar language within the same statutory section must be accorded a consistent meaning." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 502 (1998); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (same); *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992) (same).

It is also pertinent that in various other statutes, Congress has expressly preserved "state regulatory authority" to the state governments alone, and not to municipal governments as well. *See, e.g.*, 30 U.S.C. § 1291(26) (surface mining control) (defining "State regulatory authority" as meaning "the department or agency in each State which has primary

responsibility *at the State level* for administering this chapter") (emphasis added); 42 U.S.C. § 8302(21) (powerplant and industrial fuel) (defining "State regulatory authority" as meaning "any State agency which has ratemaking authority with respect to the sale of electricity by any State regulated electric utility"); 15 U.S.C. § 3202(8) (defining "State regulatory authority" as meaning "any State agency which has ratemaking authority with respect to the sale of natural gas by any gas utility (other than by such State agency)"); 42 U.S.C. § 6929 (distinguishing between a "State or political subdivision" and a "State" for purposes of regulating hazardous waste).[7] These provisions underscore the need for close analysis of congressional intent as embodied in different statutes with distinct purposes.[8]

Petitioners also rely heavily on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). Their reliance is misplaced, however, because the statutory framework and hence the preemption issues were very different in that case. In *Mortier*, the Court held that under the Federal Insecticide, Fungicide, and Rodenticide Act, 61 Stat. 163 (1947) ("FIFRA"), the States were permitted to redelegate authority to political subdivisions to regulate pesticides, even without explicit statutory language so providing, where FIFRA simply says, without elaboration, that a "State" may regulate pesticides. *See* 7 U.S.C. § 136v(a). The Court accepted this unexceptionable proposition in the

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[7] By contrast, in some contexts Congress has chosen to define "state regulatory authority" to encompass "the regulatory body of the State or municipality," 16 U.S.C. § 796(21)&(15) (hydroelectric power), which reinforces that the statutory inquiry must be contextual, and the determination must be made with specific reference to the language and purpose of a particular statute.

[8] The apparent force of this "tradition of meaning" suggested by petitioners derives in part from their references to municipal control of traffic laws. *See, e.g.*, Petr. Br. 20, 28. As discussed above, however, general traffic laws, like other general laws addressing taxation and universal terms of employment, would not be preempted by 49 U.S.C. § 14501(c)(1) in the first place. *See supra* Section I.A.1.

course of deciding that the regulations at issue were valid because Congress *had not provided* for express preemption or field preemption in FIFRA, and there was no basis for finding implied preemption under the circumstances. *See Mortier*, 501 U.S. at 604-16. Under FIFRA, therefore, state and local governments were operating unencumbered by *any* limitations imposed by federal law and thus by the Supremacy Clause.

As the lower courts have consistently recognized, the statutory framework applicable to motor carriers is significantly different from FIFRA. Unlike FIFRA, this statute *does* contain an express preemption clause, and this provision clearly applies on its terms to *both* state *and* local governments. *See* 49 U.S.C. § 14501(c)(1). Thus, the issue here is not whether preemption should be *inferred* – whether lightly or otherwise – since Congress specifically provided for it.[9] Instead, the issue is how broadly to read a statutory *exception* to an express preemption clause. Hewing to a careful analysis of the statutory text, all but one of the circuit courts have concluded that in the context of this statute, Congress acted purposely by explicitly preempting the authority "of a State" and of a "political subdivision of a State," but then saving only the safety authority "of a State."[10] Since the "ultimate touchstone" in "identify[ing] the domain expressly preempted" is congressional purpose as articulated in

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[9] Furthermore, the provision interpreted in *Mortier* included no references to political subdivisions whatsoever, *see* 7 U.S.C. § 136v, and FIFRA as a whole contains only "scattered mention" of political subdivisions in its other parts. *See Mortier*, 501 U.S. at 612. That landscape, again, is very different from 49 U.S.C. § 14501, which contains repeated references to "political subdivision[s]" – so much so that this term is invoked *seven times* in the statute, and indeed is used *everywhere but* in § (c)(2)(A). *Id.*

[10] *See Petrey*, 246 F.3d at 560-64; *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545-48 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999); *Stucky v. City of San Antonio*, 260 F.3d 424, 440-46 (5th Cir.), *reh'g denied*, 266 F.3d 342 (2001), *cert. pending*, U.S. No. 01-1028; *Tocher*, 219 F.3d at 1050-51.

the text of the statute itself, *Lorillard Tobacco*, 121 S. Ct. at 2414, this conclusion is correct for all the reasons discussed herein, and the Court's discussion in *Mortier* does not counsel otherwise. Rather, the statutory scheme here reflects the perspective Justice Scalia stated in his concurrence in *Mortier*: where Congress has provided for preemption *ab initio*, further language such as appears in the saving clause of subsection (c)(2)(A) should be understood "not as restricting certain types of state regulation (for which purpose, it makes little sense to restrict States, but not their subdivisions), but as authorizing certain types of state regulation (for which purpose, it makes eminent sense to authorize States, but not their subdivisions)." *Mortier*, 501 U.S. at 616 (Scalia, J., concurring).[11]

B. Traditional Canons of Statutory Construction Strongly Support Preemption Here.

The ordinary and natural reading of the preemption provisions is bolstered here by several fundamental principles of statutory construction. The traditional canons of interpretation form the accepted baseline for Congress when it crafts its enactments, and thus they constitute part of a close textual analysis of any federal statute. *See, e.g.*, *Rowland v. California Men's Colony*, 506 U.S. 194, 200-01 (1993) ("'It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.'") (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)); *Finley v. United States*, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of

[11] Petitioners also suggest that Congress should be understood to have legislated in light of *Mortier* when it enacted 49 U.S.C. § 14501(c) a few years later. *See* Petr. Br. 18. As discussed above, however, *Mortier* is readily distinguishable and any such alleged tradition of meaning is far from established. Even more to the point, Congress' own use of the term "regulation" in this very statute is inconsistent with the proposed meaning because it made an explicit distinction between regulations "of a State" and regulations of a "political subdivision of a State." *Id.* § (c)(1).

clear interpretive rules, so that it may know the effect of the language it adopts."). These basic rules thus further illuminate the plain meaning of the statutory provisions that are key to a proper resolution of this case.[12]

1. *The Avoidance of Surplusage.*

The Court has definitively settled that "all the words used in the statute should be given their proper signification and effect." *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (rejecting interpretation which "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"). Indeed, the Court has long embraced as "a cardinal rule of statutory construction" that "significance and effect shall, if possible, be accorded to every word. . . . This rule has been repeated innumerable times." *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879); *see* 2A Norman J. Singer, *Sutherland on Statutory Construction* § 46.06 (6th ed. 2000).

A major problem with the construction advanced by petitioners is that it requires the Court to read out of 49 U.S.C. § 14501(c) a key phrase: "political subdivision." Yet Congress deliberately inserted this term into this law, not once but repeatedly, in order to define the proper boundaries of federal preemption in deregulating the trucking industry nationwide. Petitioners' contention that the authority "of a State" must be read, even in the context of this statute, to include the authority

[12] For all the reasons set forth both above and below, petitioners' hypothetical about the Secretary of the Army, *see* Petr. Br. 24, is inapposite. A more parallel analogy would be where the Secretary enacts a general rule banning all on-duty card playing by military officers, but specifies that generals can play bridge on Tuesdays and all officers can play poker on Fridays. Under this regime, it is clear that generals could not round up captains and lieutenants to fill out their bridge game on Tuesdays.

to delegate its own power to "a political subdivision," would render the latter phrase a complete nullity.[13]

Indeed, if the authority "of a State" inevitably carried with it the absolute discretion to delegate this authority to local and municipal governments, then there would be no necessity and no reason for Congress *ever* to have supplemented its references to state authority in this statute with any additional references to municipal authority. Whenever Congress extinguished the power of "a State," it would have been understood to have also extinguished any such power as delegated to a municipality; and whenever Congress upheld the power of "a State," it would have been understood to have upheld the capacity to delegate this power to local governments. Under this view, use of the phrase "political subdivision" would serve no purpose and convey no independent significance.[14] The same is true, incidentally, of the phrase "political authority of 2 or more States," which likewise appears in both the preemption clause and one of the saving clauses, 49 U.S.C. § 14501(c)(1) & (c)(3), but is rendered void if congressional enactments could not restrain the ability of state governments to delegate their powers in this regard. *See, e.g.*, *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 79 (1990) ("In casual conversation, perhaps, such absent-minded duplication and omission are possible, but Congress is not presumed to draft its laws that way.").

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[13] This point also refutes the argument that Congress should be understood here to have "adopted" the Court's interpretation of the term "a State" as construed in *Mortier*. If Congress had done so, there would have been simply no reason for it to employ the term "political subdivision of a State" at all, let alone repeatedly, in the text of 49 U.S.C. § 14501(c).

[14] Although petitioners never avert to this problem directly, they do make one vague and elliptical assertion that by including repeated references to "a political subdivision," Congress "wisely clarified in belt-and-suspender terms the breadth of preemption." Petr. Br. 23-24. Why this redundancy would be wise, and how it would serve to clarify the meaning of the statute, are points that are never explained.

Notably, the Court recently addressed and resolved a very similar problem of statutory construction in the precise fashion urged by respondents here. In *Duncan v. Walker*, 121 S. Ct. 2120 (2001), the Court construed newly enacted language that tolled the period for filing a federal habeas corpus petition during the time when an "application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). The Court held that the plain language of this provision did not cover any federal applications, for two reasons. *First*, such a reading of the statute would "render the word 'State' insignificant, if not wholly superfluous," in violation of "our duty to give effect, if possible, to every clause and word of a statute." 121 S. Ct. at 2125 (quotations omitted). As the Court explained further: "If the phrase 'State post-conviction or other collateral review' is construed to encompass both state and federal collateral review, then the word 'State' places no constraint on the class of applications for review that toll the limitation period." *Id.* Precisely the same problem exists here, and it is avoided in precisely the same fashion. *Second*, relying on another "well settled" canon of construction that we discuss in the next section, the Court noted that several related statutes referred instead to "State or Federal post-conviction review" proceedings, and held that Congress must be presumed to act "intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 2124-25 (quotation omitted).

This inescapable problem of surplusage, especially with respect to terms so central to any natural reading of the preemption provisions, undercuts petitioners' construction of the statute. "Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *see also Department of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994) (rejecting result that "would contravene the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative") (internal quotation omitted). The

Court should not do so here, given that neither petitioners nor their *amici* have offered any sensible explanation of why Congress would have repeatedly written the phrase "political subdivision" into the preemption provisions of this statute.

2. *Language Expressly and Repeatedly Used in One Statutory Section But Purposely Omitted Elsewhere in the Same Section.*

Another pertinent canon of statutory interpretation here is that when "Congress includes particular language in *one section* of a statute but omits it in *another section* of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (emphasis added); *see also Duncan*, 121 S. Ct. at 2124-25. This case presents an even more pointed and forceful application of this standard canon, because in this statute Congress repeatedly used the same language in the same *section* and then notably omitted it from one particular *subsection*. Thus the applicability of this canon is at its zenith.

Recognizing the force of this argument, petitioners and their *amici* deprecate the importance of this rule and attempt to distinguish the *Russello* case either on its facts or in its context of a criminal prosecution. But this time-honored principle for construing statutes transcends the holding in one or another particular case; instead, it is part and parcel of a proper judicial focus that is bound by the specific text of the statute that Congress actually enacted. As the Court has succinctly put the point in addressing an analogous issue of interpretation: "The short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773-74 (1979) (rejecting suggestion that similar language should be read into successive subsections where it did not appear, in order to render them parallel).

Indeed, the Court has invoked this canon with great frequency, and it has long been established as an essential guide

to determining the plain language of controlling law in a wide variety of cases – civil and criminal, statutory and regulatory, substantive and procedural. *See, e.g.*, *Barnhart v. Sigmon Coal Co.*, 122 S. Ct. 941, 951 (2002) (statute on coal industry retiree health benefits); *Hohn v. United States*, 524 U.S. 236, 250 (1998) (criminal statute); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998) (consumer credit statute); *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (Veteran Affairs regulation held inconsistent with controlling statute); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 95 (1994) (elections statutes); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (bankruptcy statute); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (environmental statute); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (civil jurisdictional statute); *International Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 476 n.10 (1991) (labor statute); *General Motors Corp. v. United States*, 496 U.S. 530, 537-38 (1990) (administrative deadlines); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987) (statutes on futures trading); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (standard of proof for asylum claims); *FTC v. Sun Oil Co.*, 371 U.S. 505, 514-15 (1963) (antitrust statute).

Petitioners' contention that the lower courts have erred here by raising this rule "to a primary (rather than a secondary) principle of statutory construction," Petr. Br. 22, does not withstand analysis. Judicial construction begins, as here, from the specific language of the statute as a whole, starting with its express preemption clause before analyzing its subordinate saving clauses. In that posture, it is entirely proper for the courts to proceed to reinforce the plain meaning of the statute by resorting to such basic, accepted canons as avoidance of surplusage and recognition of legislative purposefulness in disparate inclusions and exclusions. *See, e.g.*, *Duncan*, 121 S. Ct. at 2124-25 (employing both canons to determine that, in context of the habeas statutes, the term "State" had a meaning distinct from the term "State or Federal"). Any suggestion that

this approach somehow injects ambiguity into the text of the statute, *see* Petr. Br. 21-22, simply begs the question of what the plain meaning of the statute is in the first place.

This statute also presents an especially appropriate occasion for applying this interpretive rule, since 49 U.S.C. § 14501 contains no fewer than *seven* express references to the regulatory authority of a "political subdivision of a State" in its other subsections, *see id.* §§ (a), (b), (c)(1), (c)(2)(C), (c)(3)(A), (c)(3)(B), and (c)(3)(C), but omits any reference to political subdivisions in subsection (c)(2)(A). In fact, the latter provision is the *only* subsection of the statute that mentions the regulatory authority "of a State" without *also* mentioning the regulatory authority of a "political subdivision of a State." It becomes even more unlikely that this omission can be dismissed as casual imprecision because the parallel express preemption provision for air carriers, in 49 U.S.C. § 41713(b)(4)(B)(I), employs the exact same language. For these reasons, Congress' considered decision to omit political subdivisions from subsection (c)(2)(A) clearly manifests its intent that municipal laws and regulations are not thereby exempted from the preemption effected by subsection (c)(1).[15]

In sum, the "disparate inclusion or exclusion" principle of statutory construction is a fundamental part of the "background of clear interpretive rules" against which 'Congress [must] be able to legislate . . . so that it may know the effect of the

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[15] Petitioners' effort to explain away Congress' usage of the term "political subdivision" in some of these provisions, including the other saving clauses, *see* Petr. Br. 25, is unpersuasive. Their dismissal of § (c)(2)(C) because it was enacted a year later is discussed below. *See infra* Section I.D.4. Their attempted distinction of § (c)(3)(A) because motor carriers are permitted to "opt out" of those provisions makes no difference whatsoever, because this saving clause is *still* addressed to the "authority of a State" or of a "political subdivision" to enact or enforce laws or regulations in specific areas – which is the precise preemption issue at stake here. *See id.*

language it adopts." *Finley*, 490 U.S. at 556. It therefore should be given its natural and proper effect here.

3. *Exceptions to Preemption Set Forth in Saving Clauses Cannot Swallow Up the Express Preemption Congress Provided.*

Finally, the Court has regularly held that a more general "saving clause cannot be allowed to supersede the specific substantive preemption provision." *Morales*, 504 U.S. at 384-85; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause"); *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (same). Here petitioners urge that the initial saving clause contained in subsection (c)(2)(A) should be construed to uphold municipal authority to impose detailed licensing schemes on any category of motor carriers, including recordkeeping, inspections, identification, and insurance requirements, and annual fees imposed per vehicle and per driver. *See* Pet. App. 36a-47a. In this respect, it bears emphasis that there is *nothing* in the language of either the preemption clause or the initial saving provision that is unique to tow trucks, as among all other motor carriers. Whatever can be done in the name of assuring the safety of tow trucks can also be done in order to promote and ensure the safety of all other motor carriers, which almost universally are bigger, heavier, and more unwieldy than other motor vehicles. This consideration is particularly problematic because, as one court has noted, "under the City's argument there is no stopping point for the potential reach of the safety exception." *Stucky*, 260 F.3d at 446.

The City of Columbus, moreover, is typical of many modern urban areas in that the principal municipality itself extends across three counties and is honeycombed with 26 other incorporated cities and villages, as well as the unincorporated areas of 17 discrete townships. Each of these units operates its own individual form of local government, and thus each has its own potential authority to impose a separate licensing scheme.

See App. A.[16] Allowing local governments to impose such an overlapping web of local licensing schemes on motor carriers such as UPS and FedEx "would be absolutely inconsistent with the provisions of the act." *Abilene Cotton*, 204 U.S. at 446.

C. The Purpose of the Motor Carrier Laws, to Deregulate Interstate and Intrastate Trucking Markets, Strongly Supports Preemption Here.

The consistent arc of federal policy with respect to the motor carrier industry for the past two decades has been toward deregulation of the trucking market and the promotion of competition to benefit consumers. *See supra* pages 3-5. The FAAA Act advanced these goals by deregulating *intrastate* trucking markets, while other measures such as the ICCTA completed the ongoing project of deregulating the *interstate* trucking market. As the Court has stated of the mirror preemption provisions in the air carrier statutes, Congress acted to preempt all state and local laws "related to a price, route, or service of any motor carrier" in order to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378.

The purpose of the FAAA Act was to create a less regulated, more uniform, market-driven economy for those who buy and sell the transportation services of motor carriage. A major problem that Congress confronted was that one participant in the trucking industry – Federal Express, now

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[16] The Eleventh Circuit has similarly noted that "a tow truck providing consensual towing services from a location in downtown Atlanta to a location in Northwest Georgia may pass through nearly a dozen political subdivisions of the State of Georgia that, under the City Defendants' reading of the statute, would possess the authority to enact safety and insurance regulations for tow truck companies," and "the number of political subdivisions rises dramatically in situations" involving long-haul tows, thereby multiplying the costs, burdens, inefficiencies, and practical problems of complying with all such regulations. *R. Mayer*, 158 F.3d at 546 n.6.

FedEx – had been held to be an "air carrier" that receives the benefits of the broad preemption imposed in the Airline Deregulation Act. *See Federal Express Corp. v. California Pub. Util. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992). FedEx thus possessed a competitive advantage over other shippers that remained subject to burdensome state and local regulations. Congress resolved this problem by extending the same broad preemption to *all* motor carriers of property, thereby leveling the playing field by aggressively rooting out such restrictions and substantially deregulating intrastate trucking markets.[17]

The House Conference Report on the FAAA Act explained that the preemption provision for all motor carriers of property "is identical to the preemption provision deregulating air carriers . . . . and is intended to function in the exact same manner with respect to its preemptive effects." H.R. Conf. Rep. No. 103-677, 103d Cong., 2d Sess. 85 (1994), *reprinted in* 1994 U.S.S.C.A.N. 1715, 1757. It thus stated that "the conferees do not intend to alter the broad interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines*." *Id.* at 83. And it also cautioned that "[t]he conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." *Id.* at 84.

Congress recognized that the benefits of free competition in the motor carrier industry would be felt by all sectors of the American economy that use truck transportation and thus were important for consumers in virtually every market. *See* 49 U.S.C. § 13101. As the Conference Report elaborated:

> [T]he conferees believe preemption legislation [for the intrastate trucking market] is in the public interest as well as necessary to facilitate interstate commerce.

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[17] The title of 49 U.S.C. § 14501 – "Federal authority over intrastate transportation" – also shows Congress' express purpose to deregulate the intrastate trucking markets.

> State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets [costing consumers billions of dollars]. . . . *The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.*

H.R. Conf. Rep. No. 103-677, *supra*, at 87, *reprinted in* 1994 U.S.S.C.A.N. at 1759 (emphasis added).[18]

Less than a year later, Congress enacted the ICCTA, which abolished the ICC and completed the project of deregulating the interstate trucking market, which "represents more than $290 billion in gross revenues" and employs "[a]lmost 8 million people." H.R. Rep. No. 104-311, 104th Cong., 1st Sess. 92 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 804. This statute again advanced its deregulatory objectives by ensuring motor carriers would be free of an entangling web of overlapping and contradictory regulations at the federal, state, and local level.

The core congressional policy of deregulation is advanced by broadly preempting state and municipal regulations and saving only state authority to act in the specific areas prescribed

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[18] The Solicitor General suggests that the reference in the Conference Report to "state economic regulation" is significant both because it does not mention "political subdivisions" and because it focuses narrowly on "economic" regulations. U.S. Br. 22-24. Neither point can control the plain language of the statute itself, which refers to political subdivisions repeatedly and goes beyond mere economic regulation to preempt all laws and regulations "related to a price, route, or service of any motor carrier" of property. 49 U.S.C. § 14501(c)(1); *see, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105,119-20 (2001) ("we do not resort to legislative history to cloud a statutory text that is clear" because it is for "Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes") (quotation omitted).

in 49 U.S.C. § 14501(c)(2)(A). Allowing both States and municipalities to escape preemption under the guise of regulating safety could lead to widespread, diverse regulation of motor carriers, precisely what Congress sought to avoid. In June 1997, there were 39,044 counties, municipalities, and townships in this country. *See* 1 U.S. Bureau of the Census, *1997 Census of Governments, Government Organization* V-VII (1999). Most of these entities have broad authority for general governance subject to limitations imposed by the State. Congress thus sensibly concluded that here, as under the antitrust laws, if municipalities were free to act solely on the basis of "their own parochial interests and without regard to their anticompetitive effects," the results would be "at odds with the comprehensive national policy Congress established" in favor of "the efficiency of free markets [engendered by] the regime of competition." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978); *see Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 133 (1991) (finding preemption to secure market efficiencies from rail consolidations sought by Congress).

As the Eleventh Circuit effectively summarized the matter: "it is reasonable to assume that Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create." *R. Mayer*, 158 F.3d at 546. The cost for a towing company – or *any* trucking company – to maintain compliance with different licensing schemes imposed by a multiplicity of political subdivisions would result in the very "inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology" that Congress sought to eliminate by deregulating the intrastate motor carrier industry. H.R. Conf. Rep. 103-677, *supra*, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759. By requiring that safety and insurance ordinances must be enacted on a statewide basis, the costs associated with complying with the ordinances are reduced dramatically, which

is consistent with the policy objectives of the FAAA Act and the ICCTA. The ramifications for a broad range of motor carriers beyond mere tow trucks are spelled out in the amicus briefs.[19]

Finally, it is noteworthy that the ICCTA also explicitly addressed the issue of state and local regulation of towing services by enacting 49 U.S.C. § 14501(c)(2)(C), which saves from preemption "the authority of a State or a political subdivision" only to apply their own laws or regulations "relating to" the *price* of *nonconsensual* towing operations. *Id.*

The House Committee Report's telling explanation of this provision in subsection (c)(2)(C) stated:

> This is only intended to permit States or political subdivisions thereof to set maximum prices for non-consensual tows, and *is not intended to permit re-regulation of any other aspect of tow truck operations*.
>
> The Committee had been asked to go farther and permit States and political subdivisions thereof to re-regulate all aspects of non-consensual tow truck services. The Committee provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services.

H.R. Rep. No. 104-311, *supra*, at 121, *reprinted in* 1995 U.S.C.C.A.N. 793, 831-32 (emphasis added). Congress thus limited the exception to include only regulations that address the *price* of *nonconsensual* towing, while leaving undisturbed the statute's preemptive effect as it pertains to all other aspects of the towing industry.[20] This discussion thus further confirms

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[19] *See* ATA Br., Sections B & C; Brief for Amicus Curiae Cargo Airline Ass'n in Support of Respondents, Section I; Brief for California Dump Truck Owners Ass'n Amicus Curiae in Support of Respondents.

[20] As noted prior to passage, "[t]he pending legislation would restore the local authority to engage in regulating the prices charged by tow trucks in non-consensual towing situations. Regulation of routes and services, *as well as regulation of consensual towing*, would still be preempted." 141 Cong. Rec. H15,602 (1995) (statement of Rep. Rahall) (emphasis added).

Congress' intent to preempt any state or local ordinance that regulates consensual towing services. In other words, section 14501(c) reflects Congress' conclusion that local regulation of the towing industry – with the narrow exception of regulations for the price of nonconsensual towing services – disturbs the development of competitive and efficient transportation services.

D. Responses to Petitioners' Miscellaneous Points About the Meaning of the Statutory Text.

Petitioners also offer several other miscellaneous points that are aimed at raising doubts about the proper construction of 49 U.S.C. § 14501(c). None is persuasive.

1. *The Meaning of "Enact or Enforce."*

First, petitioners note that the preemption clause refers to state and local efforts to "enact or *enforce*" any laws or regulations related to the price, route, or service of motor carriers. *Id.* § (c)(1) (emphasis added). They then argue that if the saving clause is not read to save municipal and local authority, then "state safety laws could never be enforced by . . . city or county police officers." Petr. Br. 26-27.

The argument is a red herring. Express preemption clauses typically do not address *who* can enforce *valid* laws; instead, they specify *what kinds* of laws, emanating from *what* branches and levels of government, *are valid* and therefore can be enforced as a general matter. Thus, in a typical case where the court finds that federal law preempts state law, the only consequence is that any such state law is inoperative. But it most assuredly does *not* mean that state law enforcement officers are thereby rendered incapable of assisting in enforcing *valid* federal laws by participating in the investigation and apprehension of violators. The same is equally true here: this preemption clause is not designed or intended to hamstring law

enforcement officials from enforcing *whatever* laws may be valid once the preemption issues have been resolved and clarified.

The language and structure of similar preemption clauses also indicates that petitioners have distorted the purpose and meaning of these statutory terms. The phrase "enact or enforce" is used in this statute *not* to refer to the disparate functions of making the law and executing it, but instead to incorporate the parallel concepts of creating new law and applying existing law. The same sense is conveyed by similar formulations in statutory preemption clauses that the Court has construed in recent years. *See, e.g.*, *Geier*, 529 U.S. 861 ("establish, or to continue in effect" pertinent provisions; later amended to "prescribe or continue in effect"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) ("establish or continue in effect"); *Easterwood*, 507 U.S. 658 ("adopt or continue in force").

Most notably, this understanding is precisely how the Court construed the very same "enact or enforce" language contained in the parallel preemption clause of the Airline Deregulation Act of 1978. There, the Court commented that the "ban on enacting or enforcing any law 'relating to rates, routes, or services' is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.'" *Wolens*, 513 U.S. at 229 n.5 (quoting Brief for the United States as Amicus Curiae); *see also id.* at 239 (O'Connor, J., concurring) ("Consequently, one must read 'no State . . . shall . . . enforce any law' to mean that *no one* may enforce state law" when such law is preempted) (emphasis in original). The supposed anomaly is thus a mirage.

2. *The "Authority of 2 or More States."*

Petitioners also contend that the conceded "deregulatory objective of the statute" would not necessarily be served by construing "State" in § (c)(2)(A) to mean the same thing it must mean in § (c)(1), where it is distinguished *both* from a "political subdivision of a State" *and* from a "political authority of 2 or more States." Petr. Br. 32. In petitioners' view, barring state governments from "aggregat[ing] their power to create regional safety rules for their streets and byways" would "expand, rather than limit, the potential number of motor carrier safety regulations." *Id.*

As a practical matter, however, this abstract hypothetical has nothing to do with the statutory reference to the "political authority of 2 or more States." 49 U.S.C. § 14501(c)(1). Nowhere in the country have two or more States *ever* surrendered their own authority over motor vehicle safety by merging to create a regional authority and ceding it such powers. Instead, this phrase is used in the statute to refer to multi-jurisdictional port authorities that are granted power to regulate particular forms of transportation in areas where political jurisdictions overlap. These entities operate *in addition to* the general authority that each State continues to exercise by regulating motor vehicle safety within its own borders. *See, e.g.*, *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (Virginia-D.C. entity that controls area airports); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (New York-New Jersey entity operates certain transportation facilities about the Hudson River); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (similar entity for port of New York City).[21] In reality, therefore, these entities *are* governmental units that operate in addition to the authority "of a State," and limiting their powers thus *does* eliminate "yet another level of

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[21] This statutory language originated in the Airline Deregulation Act of 1978, as multi-jurisdictional entities are much more common in the realm of air carriers. *See* 49 U.S.C. § 1305(a)(1) (1988). Further indicating the considered fashion in which Congress employed these phrases, however, the only provision in 49 U.S.C. § 14501(c) that omits reference to the "authority of 2 or more States" is § (c)(2)(C), which concerns tow-truck operations where such multi-jurisdictional port authorities are irrelevant.

regulation," which directly furthers the core deregulatory purpose of the statute. Petr. Br. 32 (quotation omitted).

3. *Route Controls Based on Size, Weight, and Hazardous Cargo.*

According to petitioners, the court below also erred in its statutory interpretation because if each clause of § (c)(2)(A) is read to preserve only the authority "of a State," then municipalities would be preempted from imposing "highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo." *Id.* This is an accurate statement of the consequences of the second saving clause in § (c)(2)(A), but there is nothing incorrect, absurd, or impractical about this provision.

To begin with, this saving provision only operates within the proper sphere of the principal preemption clause. As stated previously, this clause does not encompass general laws such as traffic laws. *See supra* Section I.A.1.[22] In addition, this saving provision only applies to *highway* route controls based on the size or weight of a motor vehicle or its hazardous cargo. There is nothing odd, and certainly nothing absurd, about Congress deciding that it was generally beneficial to preempt intrastate authority to dictate the routes of motor carriers, but then preserving state authority in certain specific areas to control routing on its highways. Each State could thus adopt or continue in effect its own laws controlling such matters on its highways, without the prospect of each local unit of government operating on its own to impose additional routing restrictions on those highways. It is the latter possibility, more so than the former, that would create concerns about impracticality. Those concerns are avoided by upholding the statute's preemption of regulation by local governments, just as the courts have done in applying the federal statutes governing railroad safety. *Cf. Grand Truck W.R.R. v. City of Fenton*, 482 N.W.2d 706, 708-

[22] This provision therefore does not raise any specter that "even municipal one-way-street laws would be preempted." Petr. Br. 28.

09 (Mich. 1992) (statute [now 49 U.S.C. § 20106] construed to prohibit municipal but not state regulation of train speeds to avoid "a patchwork of conflicting local rules"); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237-38 (N.D. Ind. 1987) ("municipal regulation" is "so greatly at odds with the Congressional purpose of uniformity as to need no further argument"); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.) (same with respect to predecessor statute), *cert. denied*, 414 U.S. 855 (1973).[23]

4. *Saving Clauses Enacted at Different Times.*

Finally, petitioners seek to explain away the clear thrust of the contrasting language found in the saving clauses of this statute on the grounds that some were enacted not in 1994, but in 1995 and 1998. In this respect, petitioners cite the settled rule that a later Congress cannot simply lay down a definition and impose it retroactively to control the meaning of provisions enacted by an earlier Congress. *See* Petr. Br. 25. But that specific interpretive principle fails to acknowledge the "cardinal rule" in statutory construction that "a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *King*, 502 U.S. at 221. This rule is regularly and correctly applied without regard to when the different components of a statute were first enacted. *See, e.g., Arkansas Best Corp. v. Commissioner*, 485 U.S. 212, 219 (1988) (construing statutory exclusions "created by Congress in separate enactments spanning 30 years" and concluding that without "any express direction from Congress, we are unwilling to read [the statute] in a manner that makes surplusage of these statutory exclusions") (footnote omitted).

Moreover, Congress consistently used this same phrasing to articulate the bounds of the preemption provisions of several

[23] It should be noted, however, that with respect to the routing of hazardous cargo, in particular, the Hazardous Materials Transportation Act and the FAAA Act could be harmonized either of two ways, though the Court need not decide that issue here. *See infra* pages 45-46.

closely related deregulatory statutes over two decades. In these circumstances, the words come "'freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions, history is a teacher that is not to be ignored.'" *St. Paul Fire Marine Ins. Co. v. Barry*, 438 U.S. 531, 545-46 (1978) (quoting *Duparquet Co. v. Evans*, 297 U.S. 216, 220-21 (1936)).

II. THERE IS NO CONSTITUTIONAL OR OTHER BASIS HERE FOR THE COURT TO STRAIN TO READ AROUND THE EXPRESS PREEMPTION THAT CONGRESS HAS PROVIDED.

Petitioners and their *amici* also offer two arguments that are aimed at securing relief from the plain language of 49 U.S.C. § 14501(c). *First*, the Solicitor General suggests that the Court should defer to the Secretary of Transportation's view that this deregulatory statute does not trench in any way on his delegated authority to determine preemption issues under other regulatory statutes in Title 49, including his evaluation of state and local measures affecting motor vehicle safety. This suggestion must be rejected not only because, as the Secretary concedes, he is given no authority to umpire preemption issues under 49 U.S.C. § 14501, but also because where "the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Second*, petitioners and their *amici* contend that the interpretation of this statute adopted by the majority of the lower courts raises Tenth Amendment concerns and thus should be construed to avoid constitutional doubts. As explained below, we believe this contention is not supported by either precedent or logic, and we thus urge that the law enacted by Congress should be applied according to its terms.

A. This Deregulatory Statute, Which Confers No Role for Any Agency to Decide Preemption, Affords No Basis to Grant Deference to DOT Based on Other Regulatory Statutes.

The Solicitor General frankly acknowledges that neither 49 U.S.C. § 14501 itself nor the FAAA Act "confers rulemaking authority on the Secretary of Transportation." U.S. Br. 27. Because the Secretary has no delegated authority under this statute, there is no basis to defer to his interpretation of its express preemption clause, which is self-executing and makes no provision for any regulatory implementation. Accordingly, the Secretary's bid for judicial deference under *Chevron* must be rejected here.

In *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001), the Court addressed the issue of when agency interpretations of federal law are entitled to deference. As the Court noted, "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of 'notice and comment' rulemaking or formal adjudication." *Id.* at 2167. Outside that context, there must be "circumstances reasonably suggesting that Congress ever thought of [particular agency actions] as deserving the deference claimed for them" and thus imparting to them "the force of law." *Id.* at 2173-74. Here, letter memoranda from a DOT employee purporting to interpret the new stand-alone provisions of 49 U.S.C. § 14501(c) are just what they say they are – mere "interpretive guidelines" – and they are not entitled to *Chevron* deference. *See Mead*, 121 S. Ct. at 2173-75; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

This is particularly true with respect to the task of determining the scope of an express preemption clause. As the Court has stated in an analogous context, "Congress has expressly established the Judiciary, not the [Secretary,] as the adjudicator of [preemption] under the statute. A precondition to deference under *Chevron* is a congressional delegation of administrative authority," which again is lacking here under either 49 U.S.C. § 14501(c) or the FAAA Act. *Adams Fruit*

Co. v. Barrett, 494 U.S. 638, 649-50 (1990); *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 743-44 (1996) (assuming, without deciding, that "the question of whether a statute is preemptive . . . . must always be decided *de novo* by the courts"); *Medtronic*, 518 U.S. at 512 (O'Connor, J., concurring and dissenting in part) (same).

Moreover, this is not a case where Congress made the scope of preemption turn on the scope of agency regulations. In such cases, Congress has clearly conferred a central role on the governing agency in deciding the extent of preemption under the statute. *See Geier*, 529 U.S. at 874-83 ("Congress has delegated to DOT authority to implement the statute; the subject matter is technical, and . . . . [t]he agency is likely to have a thorough understanding of its own regulation and its objectives"); *Medtronic*, 518 U.S. at 495-96 ("Congress has given the FDA a unique role in determining the scope of [the statute's] preemptive effect," for preemption "does not arise directly as a result of the enactment of the statute," but occurs "only to the extent that the FDA has promulgated a relevant federal 'requirement'"). In this statute, by contrast, Congress gave DOT no role at all. As the Court has held on prior occasions, "it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adams Fruit*, 494 U.S. at 650 (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

At most, then, an informal "interpretive guideline" prepared by officials within the Department of Transportation, in response to questions from the public, is entitled only "to claim respect according to its persuasiveness." *Mead*, 121 S. Ct. at 2168, 2175-77 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (deference depends on "the thoroughness evident in its consideration" and "the validity of its reasoning"). But there is little persuasive force to these memoranda. They are not at all "thorough," for the relevant comments consist of isolated sentences of *ipse dixit* with no supporting reasoning. *See* U.S. Br. 25-26 (quoting DOT interpretive memoranda).

Indeed, these "interpretive" comments do not even purport to *interpret*; they do not analyze or even mention the statutory language of 49 U.S.C. § 14501(c). *See Sloan v. SEC*, 436 U.S. 103, 117-19 (1978) (denying deference because agency failure to analyze statutory authority "lacks power to persuade"). Thus they never come to grips with the plain meaning of the statutory text and do not tackle any of the problems of construction discussed above. *See* Section I, *supra*. *See also, e.g., Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 352-56 (2000) (rejecting the Government's position on preemption as inconsistent with the Court's own construction of statute and regulations); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (rejecting construction urged by the Government because, as "our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"). Further, the statements carry no formal or legal force, but purport only to be interpretive.

Petitioners and the Solicitor General also note that other regulatory statutes, which predated the enactment of 49 U.S.C. § 14501(c), remain on the books unrepealed and in certain respects touch on areas (safety, highway routing, insurance) that come within the exemptions contained in subsection (c)(2)(A). *See* Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, tit. II, 98 Stat. 2832 (providing for federal regulation of the safety of commercial motor vehicles engaged in interstate commerce); Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 401-04, 96 Stat. 2154-57 (providing federal grant-in-aid program to the States for regulating the safety of commercial motor vehicles engaged in intrastate commerce); Hazardous Materials Transportation Act, Pub. L. No. 93-633, tit. I, 88 Stat. 2156 (providing for federal regulation of transportation of hazardous materials) ("HMTA"). They contend that because the Secretary is authorized to review and negate state *and local* laws or regulations under the provisions of those *other* regulatory statutes, the text of the express preemption clause in

this deregulatory statute must be construed to authorize municipal regulation under subsection (c)(2)(A). *See* Petr. Br. 29-31; U.S. Br. 16-22.

Their argument is flawed in several respects. First, they err in claiming that Congress' express preemption of certain municipal regulations in subsection (c)(1), coupled with its failure to save them in subsection (c)(2)(A), somehow renders meaningless the Secretary's review authority under these other statutes. *See* Petr. Br. 29; U.S. Br. 19-20. To the contrary, the Secretary retains considerable review authority: he still may assess and negate any state laws or regulations, and he still may assess and negate any municipal regulations that are not expressly preempted by 49 U.S.C. § 14501(c)(1) – either because they do not involve "motor carriers of property" under subsection (c) or because they are not encompassed within the terms of the principal preemption clause ("related to a price, route, or service"). Indeed, as discussed further below, the kinds of general safety requirements imposed by federal law on *all* commercial motor vehicles – like the general safety standards that are imposed on all citizens and vehicles under tort law and traffic regulations – are not within the scope of this preemption clause. *See also* Section I.A.1, *supra*.

Second, the argument also misstates the effect of these other regulatory statutes in important respects. The federal laws and regulations governing the safety of commercial motor vehicles, *see* 49 U.S.C. §§ 31131-47, and the corresponding federal grant-in-aid program to the States, *see id.* §§ 31101 *et seq.*, simply do not govern state and local regulations that target specific segments of the motor carrier industry, such as motor carriers of property or tow truck operators. Instead, they govern only regulations that "apply to all segments of the motor carrier industry (*i.e.*, for-hire and private motor carriers of property and passengers)." 49 C.F.R. § 350.333(a). State and local authority in this realm is thus limited to enforcement of accident-prevention safety regulations that apply to *all* commercial motor vehicles, which is the specific realm of federal

regulation under these statutes. This legislative scheme also accords with the only definition of "motor vehicle safety" provided in Title 49, which is the "performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle." 49 U.S.C. § 30102(a)(8). All of these federal safety laws and regulations are directed to improving the safety performance of motor *vehicles* and motor vehicle *operators* generally – whether commercial or otherwise – and their effect on state and local laws occurs within that orbit.

In this light, it is inaccurate to suggest that the municipal licensing scheme for tow trucks challenged here, as a putative safety measure, remains subject to review and possible negation by the Secretary under these other statutes and thus cannot be preempted under 49 U.S.C. § 14501(c). This licensing program does not apply generally to all commercial motor vehicles, and thus it would not be germane to the Secretary's review authority under 49 U.S.C. § 31141. *See also* 49 C.F.R. § 355.25(a).

The Solicitor General also cites two recent administrative preemption reviews in the realm of hazardous waste transportation, in order to show that municipal authority in this area is not expressly preempted by 49 U.S.C. § 14501(c). *See* U.S. Br. 22 (citing 66 Fed Reg. 37,260 (2001); 66 Fed. Reg. 29,867 (2001)). But those reviews did not discuss preemption under section 14501(c); indeed, in each, DOT carefully noted that its preemption determinations "do not address issues of preemption arising under . . . statutes other than the Federal hazardous material transportation law." 66 Fed. Reg. at 37,262; *id.* at 29,869. A matter in which a particular statutory issue is neither raised nor decided does not constitute an authoritative precedent on that issue.

That being said, there is force to this one narrow argument: the federal hazardous waste transportation laws, which

contemplate state *and* local regulation, *see* 49 U.S.C. §§ 5112(b)(1)(H)(i) & 5125(d)(1), are inconsistent with the second clause of the saving provision of 49 U.S.C. § 14501(c)(2)(A), which permits only "a State" to impose highway route controls based on "the hazardous nature of the cargo." *Id.* Of course, that issue is not raised in this case, and it need not and should not be decided here. *Cf. Egelhoff*, 532 U.S. at 152 (declining to opine on whether "slayer" statutes are preempted by ERISA). In fact, it could be resolved either by construing the later statute (the FAAA Act) to have modified the earlier, *see, e.g.*, *Morales*, 504 U.S. at 384-85, or the more specific statute (the HMTA) could be construed to control within the limits of its particular realm, *see, e.g.*, *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988).

The important point here, however, is that the authority to regulate the safety of motor vehicles under the motor carrier deregulatory statutes, which is preserved only to "a State" in 49 U.S.C. § 14501(c)(2)(A), is not undercut by the provisions of the other federal motor vehicle safety statutes. There is nothing odd or even impractical about the notion that Congress would have decided to reserve only to the States, and not to municipalities and other political subdivisions, the authority to regulate "motor vehicle safety;" impose highway route controls based on size, weight, or hazardous cargo of vehicles; and regulate insurance requirements. Indeed, Congress went even further with respect to insurance requirements, providing in 49 U.S.C. § 14504 that even regulation *by each State* of motor carrier insurance information was too burdensome and thus that single-state registration must be accepted as valid evidence of motor carrier insurance coverage in all other jurisdictions. *See id.* All of this is fully consistent with the core purpose of the motor carrier deregulatory statutes to clear away regulatory impediments and inefficiencies in order to promote competition with its benefits for consumers. *See* Section I.C, *supra*.

In sum, the statute at issue in this case confers no authority on any agency to determine preemption. And the mere fact that

this statute is codified in Title 49 does not endow the Secretary with the ability to inject his judgments about preemption from other *regulatory* statutes in order to alter the scope of the express preemption clause that Congress enacted in this *deregulatory* statute. The terms of this statute cannot be read, and simply could not have been intended, to provide for DOT to serve as the umpire for preemption on a case-by-case basis with respect to licensing schemes imposed on trucks in thousands of local municipalities throughout the country.

B. The Tenth Amendment Does Not Require the Court to Depart from the Plain Language of the Express Preemption Clause.

Petitioners' final argument is that federal preemption of municipal regulations concerning motor vehicle safety would raise Tenth Amendment concerns, and thus at a minimum the Court should impose a "plain statement" rule that they contend is not met in this case. *See* Petr. Br. 34-38. The premise of the argument is that it is unusual and unjustified for Congress to exercise its authority to preempt state or local law by "dictat[ing] the state processes for legislating" – in this instance, by prohibiting a State from delegating authority to its political subdivisions. *Id.* at 34. The *amici* go further, arguing that such federal legislation cannot constitutionally be enacted at all under the Tenth Amendment or even the Commerce Clause. *See, e.g.*, Cities' Br. 13-17; CLS Br. 3-24.

These arguments are out of step with the Court's precedents. First, it is settled that Congress *does* have the power under the Constitution to legislate in this manner. In *Geier*, for example, the Court parsed the provisions of the federal motor vehicle safety laws and concluded that these statutes expressly preempted state statutes and regulations, but did not expressly preempt (and only in some instances impliedly preempted) state common-law claims. *See* 529 U.S. at 867-74. In other words, the Court construed the federal statute to preempt state legislation and state executive regulation, but not necessarily to preempt state judicial action based on the

common law. Nothing in the Court's opinion suggests that the resulting schematic was unusual or unjustified, and the Court neither mentioned any constitutional concerns nor suggested that a "plain statement" rule was needed in this posture. A plurality of the Court reached precisely the same conclusions in the *Medtronic* case, which again raised no apparent constitutional concerns. *See* 518 U.S. at 486-91 (Stevens, J.).

Moreover, the Court reached a similar but even more complicated conclusion in *Wolens*, a case that arose out of virtually the same express preemption clause at issue here. There the Court held that the airline deregulation statute "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." 513 U.S. at 222. The upshot was that statutory enactments were preempted, but judicial actions based on the common law of contracts were not, *except* that where the latter claims invoked independent policy concerns embedded in state common law, those policies could not be applied to define the terms of the parties' agreement. *Id.* at 226-33.

In each of these cases, therefore, the Court's preemption rulings readily ratified Congress' handiwork by upholding statutes that permitted the States to act only through their courts but not through legislation or regulation. Presumably one could view this result as "dictat[ing] the state processes for legislating," Petr. Br. 34, but that is not the proper way to view federal preemption under the Supremacy Clause. Indeed, in every one of these cases the Court approached its task in determining preemption simply as one of pure statutory construction, without imposing any plain statement rules or suggesting any lurking constitutional concerns.

These decisions are also in harmony with established Tenth Amendment jurisprudence. The Court has held that Congress cannot "commandeer" state governments and state officials, either by requiring them to pass legislation, *see New York v. United States*, 505 U.S. 144 (1992), or by conscripting them to implement and enforce federal law, *see Printz v. United States*,

521 U.S. 898 (1997). But Congress' exercise of its power to preempt state and local law by "impos[ing] preconditions to continued state regulation of an otherwise pre-empted field," *id.* at 929, does neither. Instead, it merely calibrates the balance of authority by specifying which areas and categories of state and local law are superseded by federal law under the Supremacy Clause. This action does not blur political accountability or "compromise the structural framework of dual sovereignty." *Id.* at 929-32. *See also* TRAA Br., Section I.

Indeed, enactments such as 49 U.S.C. § 14501(c) are *more* respectful of federalism than the fulsome across-the-board preemption of state and local law that petitioners and their *amici* concede would be well within congressional authority. *See* Petr. Br. 34. Virtually all of the *amici* concede that Congress would have the power to occupy the field of motor carrier regulation by preempting *all* state and local law. *But see* CLS Br. 3-24.[24] Yet if Congress were to determine that federal objectives could be satisfied with a more limited invalidation of existing law, and thus were to allow state law to remain intact while preempting only the larger web of local regulations, the illogical argument presented here is that this more deferential approach to preemption would violate principles of federalism. The Solicitor General explicitly addressed this very argument in *Mortier*, and urged the Court to reject it, even though it was raised by the party on the same side of the case:

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[24] The federal statutes deregulating the motor carrier industry nationwide were properly enacted pursuant to Congress' authority under the Commerce Clause, based on its considered view that these intrastate activities "substantially affect interstate commerce," for the Court has "upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This is also clearly a situation in which "the [de]regulatory scheme could be undercut unless the intrastate activity were [preempted]." *Id.* at 561.

> [T]here is no contention here that Congress is not constitutionally empowered to prohibit *all* state and local regulation of the particular subject matter involved in this litigation. The claim, instead, is that, if Congress concludes that a multiplicity of local regulation would be incompatible with the purpose and operation of the federal program, Congress must also preclude state-wide regulation in order to achieve that result even though it believes that state-wide regulation should be permitted. *Such a contention stands the Tenth Amendment on its head.*

Brief for United States as Amicus Curiae 23 n.21, *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (U.S. No. 89-1905) (second emphasis added). The same is true here.

For these reasons, the circumstances of this case do not give rise to constitutional doubts under the Tenth Amendment. In the end, the only real question is whether Congress wielded the power it clearly had, which presents a pure issue of statutory construction. No plain statement rule or other basis exists here to justify a departure from the customary task of interpreting and applying the plain meaning of the statutory text. And in any event, the language of this statute governing preemption is plain, for all the reasons discussed previously. *See* Section I, *supra*.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID A. FERRIS
CARLILE PATCHEN & MURPHY
366 East Broad Street
Columbus, Ohio 43215
(614) 628-0808

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Respondents

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APPENDIX A

Population Data for Franklin County, Ohio*

Townships		*Incorporations*	
Blendon	9,596	Bexley	13,293
Brown	2,016	Brice	106
Clinton	4,580	Canal Winchester	3,722
Franklin	13,528	Columbus	701,426
Hamilton	4,419	Dublin	24,976
Jackson	4,849	Gahanna	34,503
Jefferson	4,450	Grandview	7,027
Madison	13,216	Grove City	25,129
Mifflin	663	Groveport	3,573
Norwich	4,135	Harrisburg	357
Perry	4,587	Hilliard	21,064
Plain	2,667	Lockbourne	283
Pleasant	6,867	Marble Cliff	652
Prairie	17,555	Minerva Park	1,683
Sharon	1,994	New Albany	3,361
Truro	1,645	New Rome	116
Washington	1,790	Obetz	3,876
		Pickerington	8,035
		Reynoldsburg	31,466
		Riverlea	515
		Upper Arlington	35,921
		Urbancrest	955
		Valleyview	604
		Westerville	34,948
		Whitehall	20,675
		Worthington	15,059

* Source: *Road Atlas of Franklin County, Ohio* (2000).